Chia Yan Tek & Anor v Ng Swee Kiat & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-821 OF 1995
GOPAL SRI RAM, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JJCA
3 JULY 1997

Civil Procedure *— Appeal — Interference by appellate court — Assessment of evidence by trial judge — Whether trial judge adopted the correct approach and judicially appreciated the evidence presented to him without falling into error and without misdirecting himself — Whether facts of case warrant appellate intervention*

Civil Procedure *— Jurisdiction — Restitution — Grant of order to restore status quo ante in the absence of a counterclaim — Whether court has inherent jurisdiction to grant restitution*

The appellants alleged that they had handed over their shares in a company, Peringkat Juta (M) Sdn Bhd ('Peringkat Juta'), to the respondents with the intention that the shares be sold and transferred to a third party. This, they further alleged, was not done. Thus, the appellants brought an action against the respondents claiming for a declaration that the transfer of the shares by the appellants to the respondents in Peringkat Juta was null and void and of no effect because it had been obtained by means of fraudulent misrepresentation. Pursuant to an ex parte order which the appellants obtained soon after the filing of the writ, the appellants seized the books and documents of Peringkat Juta in the hands of the respondents and proceeded to transfer all the shares in Peringkat Juta to third parties.

The trial judge found the respondents' version of events to be more consistent with truth than the version advanced by the appellants. The appellants' claim was dismissed and the judge ordered that the status quo ante, before the offending ex parte order had been obtained by the appellants, be restored. The appellants appealed.

Held, dismissing the appeal:

(1) Based on the evidence presented before him, the trial judge was entitled to make his own assessment as to where the truth lay. An appellate court is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it. If the appellate court cannot be satisfied that the judge with those privileges was plainly wrong, then it is the duty of the appellate court to defer to his judgment. Having read the judgment appealed against and having given the utmost consideration to the submissions of counsel for the appellants, the court found that this case did not warrant appellate intervention. The judge adopted the correct approach and judicially appreciated the evidence presented to him without falling into error and without misdirecting himself (see pp 722B–I and 723A); *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49 and *Clarke v Edinburgh Tramways Co* (1919) SC (HL) 35 followed.

(2) Although an order to restore the status quo ante could only be made in the face of a counterclaim which was absent in the present case, the jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it. The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution. Thus, in the present case, the judge was entirely correct in making the orders as he did and had ample jurisdiction to grant them (see p 723B–G); *Malacca Malay Guru-Guru Co-operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors* [1971] 1 MLJ 107 followed.

Obiter:

Fraudulent misrepresentation renders a contract voidable. However gross the fraud may be, it does not make a contract void. This is made clear by s 19(1) of the Contracts Act 1950 (see p 720C–D).

[Bahasa Malaysia summary

Perayu-perayu mengatakan bahawa mereka telah menyerahkan saham-saham mereka dalam sebuah syarikat, Peringkat Juta (M) Sdn Bhd ('Peringkat Juta'), kepada penentang-penentang dengan tujuan supaya saham-saham dijual dan dipindah kepada pihak ketiga. Mereka selanjutnya mengatakan bahawa ini tidak dilakukan. Justeru itu, perayu-perayu memulakan tindakan terhadap penentang-penentang dengan menuntut perisytiharan bahawa pemindahan saham oleh perayu-perayu kepada penentang-penentang dalam Peringkat Juta adalah tak sah dan terbatal dan tidak mempunyai sebarang kesan kerana ia telah diperolehi melalui cara salah nyata fraud. Menurut suatu perintah ex parte yang diperolehi oleh perayu-perayu tidak lama selepas pemfailan writ, perayu-perayu merampas buku-buku dan dokumen-dokumen Peringkat Juta dalam tangan penentang-penentang dan terus memindah semua saham dalam Peringkat Juta kepada pihak ketiga.

Hakim perbicaran mendapati versi penentang-penentang mengenai peristiwa-peristiwa adalah lebih konsisten dengan kebenaran berbanding dengan versi yang dikemukakan oleh perayu-perayu. Tuntutan perayu-perayu ditolak dan hakim memerintahkan bahawa status quo ante, sebelum perintah ex parte yang melanggar telah diperolehi oleh perayu-perayu dikekalkan. Perayu-perayu membuat rayuan.

Diputuskan, menolak rayuan:

(1) Berdasarkan keterangan yang dikemukakan di hadapan beliau, hakim perbicaraan berhak membuat penilaian sendiri atas di manakah kebenaran terletak. Sebuah mahkamah rayuan berada dalam kedudukan yang kurang bermanfaat untuk memutuskan isu kebolehpercayaan berbanding dengan hakim perbicaraan yang telah mendengar keterangan penuh dan memerhatikan saksi-saksi ketika memberi keterangan. Sekiranya mahkamah rayuan

tidak berpuas bahawa hakim dengan kelebihan itu dengan jelasnya terkhilaf, maka menjadi tugas mahkamah rayuan untuk mengikut penghakimannya. Selepas membaca penghakiman yang dirayu dan memberikan pertimbangan yang tertinggi kepada hujah peguam perayu-perayu, mahkamah mendapati bahawa kes ini tidak memerlukan masuk-campur kuasa rayuan. Hakim telah menerima-pakai pendekatan yang betul dan telah menilai keterangan yang dikemukakan kepada beliau tanpa melakukan kesilapan dan tanpa salah arah diri (lihat ms 722B–I dan 723A); *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49 dan *Clarke v Edinburgh Tramways Co* (1919) SC (HL) 35 diikut.

(2) Walaupun suatu perintah untuk mengembalikan status quo ante hanya boleh dibuat terhadap tuntutan balas yang tidak didapati dalam kes ini, bidang kuasa untuk membuat restitusi sedia ada di setiap mahkamah dan dilaksanakan bila-bila masa keadilan kes menghendakinya. Prinsip dasar adalah bahawa apabila penghakiman atau perintah utama ditukar atau diakas, kesemua perintah yang berbangkit atau bergantung kepadanya adalah terjejas dan kesalahan yang berlaku di bawahnya haruslah diperbetulkan dengan memberikan restitusi. Justeru itu, dalam kes ini, hakim adalah betul pada keseluruhannya dalam membuat perintah seperti yang dibuat dan mempunyai bidang kuasa yang luas untuk membenarkannya (lihat ms 723B–G); *Malacca Malay Guru-Guru Co-operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors* [1971] 1 MLJ 107 diikut.

Obiter:

Salah nyata fraud tidak menyebabkan suatu kontrak menjadi boleh batal. Walau bagaimana melampau fraud, ia tidakmenyebabkan suatu kontrak menjadi tak sah. Ini dijelaskan oleh s 19(1) Akta Kontrak 1950 (lihat ms 720C–D).]

Notes

For cases on interference by appellate court, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 465–469.

For cases on jurisdiction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2092–2255.

Cases referred to

Clarke v Edinburgh Tramways Co (1919) SC (HL) 35 (folld)

Malacca Malay Guru-Guru Co-operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors [1971] 1 MLJ 107 (folld)

Tan Chow Soo v Ratna Ammal [1969] 2 MLJ 49 (folld)

Legislation referred to

Contracts Act 1950 s 19(1)

Appeal from: Suit No 22–339 of 1993 (High Court, Shah Alam)

Raja Aziz Addruse (*CK Tan* with him) (*CK Tan & Co*) for the appellants. A
Ajit Singh Muker (*Lovelace & Hastings*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering oral judgment of the court): The appellants in this case are husband and wife. They brought an action against the respondents who are also husband and wife. The relief claimed, in essence, was for a declaration that the transfer of 100 shares by the appellants to the respondents in a company known as Peringkat Juta (M) Sdn Bhd ('Peringkat Juta') is null and void and of no effect because it had been obtained by means of fraudulent misrepresentation. B C

Now, we must confess that when we first read the record, we found that a little odd. Fraudulent misrepresentation renders a contract voidable. However gross the fraud may be, it does not make a contract void. This is made clear by s 19(1) of the Contracts Act 1950.

To return to the facts, the gist of the appellants' case is that they are the true owners of a piece of land the alienation of which they had obtained by their own exertions. Their ownership was asserted by reference to they being the controlling mind and will of Peringkat Juta which eventually became the registered proprietor of the land. According to the appellants, it was the first appellant who applied for the land in June 1991. However, he did not have with him, and could not produce at the trial, a copy of the application made to the appropriate authority. D E

It was further contended by the appellants that they had obtained this land through the assistance of one Murugan, the political secretary to a State Assemblyman, one Dato' Thurai, who has since died. Murugan was given a 70% interest in the shareholding of Peringkat Juta in order to obtain the alienation of the land in question. But he was to give up his rights to the shares once Peringkat Juta was registered as the proprietor. So what in effect, the appellants were disclosing to the court, was a scheme to pervert the system of public administration of a state by misrepresenting the true facts in order to obtain the alienation of land unto themselves. This aspect of the case was never pursued in the court below. We therefore do not propose to say anything further about it. F G

After having got the land alienated to Peringkat Juta, the shares in it as well as the other secretarial documents were handed over by the appellants to the respondents. The appellants said that they did this only because, on the faith of an assurance given by the late Dato' Thurai, they trusted him and the respondents to find a purchaser for the land. It was not proposed to sell the land itself. What was intended was that the shares in Peringkat Juta would be sold and transferred to a third party who would by that acquisition come to own the land. H

The first appellant in evidence before the trial judge testified that he had on several occasions approached the respondents on the question of the sale to a third party. Nothing happened. He was concerned and became apprehensive. He wanted to get the property back. So he commenced legal proceedings to this end. I

A What happened soon after filing of the writ is a matter of astonishment. The appellants proceeded ex parte before a judge in the High Court at Shah Alam. They placed a summons before him asking for an injunction. They also had a prayer for a declaration in terms corresponding to the relief claimed in prayer 1 of the statement of claim. They obtained both orders.

B We find this quite amazing because a declaration may not be obtained in this fashion, without argument and ex parte. Armed with the order, they seized the books and documents of Peringkat Juta in the hands of the respondents. With almost equal speed, they proceeded to transfer all the shares in Peringkat Juta to two companies and an individual. Valuable consideration exchanged hands and the transaction was completed. The C respondents were thus left to fight a rear-guard action to defend what they had had in their hands until the execution of the ex parte order we spoke of a moment ago.

Both sides called a number of witnesses in support of their respective cases. The appellants' claim turned on an assertion of facts made by them. D Much the same was the respondents' case.

In order to persuade the trial judge that their respective versions were the truth, Raja Aziz Addruse, counsel for the appellants before us (but who did not appear in the court below) identified three points of reference. He has neatly summarized them as follows:

E (1) When was the application for alienation of the land made?

(2) Who made the appeal to reduce the premium levied by the state authority for the alienation of the land?

(3) Who purchased the shelf company?

F After an admirable analysis of the evidence, the learned trial judge, James Foong J, found the respondents' version of events to be more consistent with truth than the version advanced by the appellants. He dismissed the appellant's claim with costs and made some consequential orders, to which we will refer later in this judgement. The appellants, being dissatisfied with the decision of the trial judge, have appealed to this court.

G Raja Aziz Addruse, with his usual clarity, has highlighted several points, which he says were overlooked by the trial judge. For example, counsel has drawn our attention to the letter of approval by the land office at Petaling, which speaks of an application for alienation made on 28 June 1991. Raja Aziz says this is entirely consistent with the first appellant's H version because the first appellant said that he had made the application in June 1991.

Counsel then referred us to an application claimed by the respondents to be theirs. It appears on p 1032 of Vol 3 of the Record of Appeal. The date of that document is 1 November 1991. That date is inconsistent with I the date appearing on the letter of approval. It follows, counsel submits, that what had been approved was his clients' application and not the application produced by the respondents. As we have said, the first appellant could not produce a copy of the application that he had submitted.

But we would hasten to add that there is other evidence, which does not appear to support the appellants' argument. The Assistant Land

Administrator, Petaling, who was called as a witness by the respondents, testified that apart from the application dated 1 November 1991 (which he produced from his file to the court) no other application had ever been made in the name of Peringkat Juta. There had, however, been an application by some other company for the same piece of land.

Based on the evidence presented before him, the trial judge was entitled to make his own assessment as to where the truth lay. Though, at first blush, we found the argument of Raja Aziz on the several points of reference to be attractive in point of logic, we must respectfully say that upon closer examination they are without merit.

In the words of Lord Diplock in *Tan Chow Soo v Ratna Ammal* [1969] 2 MLJ 49 at p 50:

> ... this was a classic example of a case in which the decision depends entirely upon which parts of the conflicting testimony of the witnesses who gave oral evidence before the learned judge, at the trial, were to be believed. An appellate court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility than the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment.

The approach an appellate court should adopt in a case of this nature has been stated repeatedly. But we must express our own inability to find a clearer statement of the appellate function than that formulated by Lord Shaw of Dunfermline in his speech in *Clarke v Edinburgh Tramways Co* (1919) SC (HL) 35 at p 36. This is how he put it:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the trial judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them or heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice, in the ordinary case, things are more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them, which can never be reproduced in the printed page. What in the circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: am I — who sit here without the advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Having read the judgment appealed against and having given the utmost consideration to the submissions of counsel for the appellants, we are

A unable to say that this case is one which warrants appellate intervention. On the other hand, we are entirely satisfied that the learned judge adopted the correct approach and judicially appreciated the evidence presented to him without falling into error and without misdirecting himself.

We now turn to consider the orders made by the learned judge. B When we first countenanced them, we thought they had been made without jurisdiction because what the learned judge had done, or attempted to do, was to restore the status quo ante, before the offending ex parte order had been obtained by the appellants. We formed the initial opinion that such orders could only be made in the face of a counterclaim which was absent in the present case.

C However, in response to questions from us, Mr Muker has drawn our attention to the following passage in the judgment of Sharma J in *Malacca Malay Guru-Guru Co-operative Thrift & Loan Society Ltd v Tan Mei Hua & Ors* [1971] 1 MLJ 107 at p 109:

> D The jurisdiction to make restitution is inherent in every court and is exercised whenever the justice of the case demands it (see *Jai Berhm v Kedar Nath Marwari* AIR 1922 PC 269, *Prayag Narain v Kamekhea* LR 36 IA 97). In *Lala Bhagwan Das v Lala Kishen Das* [1953] SCR, the Supreme Court of India put the matter thus:
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> > E 'On the reversal of a judgment, the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the court to enforce that obligation unless it is shown that restitution would be purely contrary to the real justice of the case.'
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> F The underlying principle is that when the main judgment or order is varied or reversed, all orders consequential or depending upon it are affected and wrongs done under them have to be righted by granting restitution. In order to do this, the court may make any order including an order for the refund of costs or the payment of interests, damages, compensation or mesne profits as may properly be consequential on such variation or reversal of order.

G Having read what Sharma J had to say upon that occasion, we are satisfied that the learned judge was entirely correct in making the orders that he did and had ample jurisdiction to grant them. Raja Aziz, with usual candour, supports the view expressed in the passage quoted above.

For the reasons given thus far, we are of the opinion that this appeal lacks merit and should be dismissed. We would accordingly do so and make those orders which are consequent upon dismissal.

H Our orders are as follows.

The appeal be and is hereby dismissed with costs. The orders of the judge are affirmed. With the consent of counsel on both sides, we award RM10,000 as costs of the appeal in lieu of taxation. The deposit lodged in court shall be paid out to the respondents to account of their fixed costs.

I *Appeal dismissed.*

Reported by Jafisah Jaafar